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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1124

BONNIE J. BISSELL, ET AL.,
Petitioners,

vs.

EDMOND J. McELLIGOTT, ETC., and UNITED STATES OF AMERICA,
Respondents.

No. .....

SYLVIA LYNN GAMPHER, ET AL.,
Petitioners,

vs.

EDMOND J. McELLIGOTT, ETC., and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REESE, CONSTANCE & SLAYTON
ALAN B. SLAYTON
501 W. Lexington
Independence, Missouri
KRETSINGER & KRETSINGER
TOM B. KRETSINGER
450 Professional Building
Kansas City, Missouri
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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Petitioners, Bonnie J. Bissell and Linda Kay Bissell, by their guardian Mildred Durbin, and Mildred Durbin and Sylvia Lynn Gampher and Stephen Glen Gampher, by and through their duly appointed next friend Lloyd Gampher,

and Lloyd Gampher pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on December 6, 1966.

THE OPINIONS BELOW

The opinion of the trial court sustaining defendant United States' motion for summary judgment is reported at 248 F. Supp. 219. That of the Court of Appeals for the Eighth Circuit sustaining that judgment is reported at 369 F.2d 115.

The judgment of the Court of Appeals was rendered on December 6, 1966; no motion for rehearing was filed.

JURISDICTION

Jurisdiction is conferred upon this Court to review said judgment by Section 1254(1), Title 28, United States Code, which provides:

> "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."
>
> * * *
>
> —Act of June 25, 1948, ch. 646, 62 Stat. 928.

THE QUESTION PRESENTED FOR REVIEW

To what extent, if any, shall the Court consider federal statutes and military regulations in determining whether or not negligent or wrongful acts of a serviceman were committed within the scope of his office or employment under applicable State law, 28 U.S.C. §1346(b), §2671 *et seq.* for wrongful death, personal injuries and property damage?

THE STATUTE INVOLVED

Section 1346(b), Title 28, United States Code, provides as follows:

> "(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

STATEMENT OF THE CASE

S/Sgt. Leon Tompkins, AF 1623228, was a member of the United States Air Force on May 19, 1963. He was attached to the 3349th Instr. Sqdn., stationed at Chanute AFB, Illinois. Under orders of that date, Sgt. Tompkins was assigned to Sheppard AFB, Wichita Falls, Texas, on temporary duty (TDY) for a period of 36 days, including four days travel time. The period of this TDY was to commence on May 19, 1963. Tompkins was expressly authorized to drive his personally owned automobile to and from Sheppard AFB, and was paid for 1,680 miles at the rate of 5¢ per mile, or a total of $84.00.

Tompkins signed out of Chanute AFB on Friday, May 17, 1963, at 1325 hours, or 1:25 P.M., although Tompkins' authorized departure date under the temporary duty orders

was May 19, 1963. The military leave record of Tompkins indicates he was in a leave status on the 17th and 18th of May, 1963 (Plaintiffs' Exhibit 1).

Upon completion of his temporary duty assignment at Sheppard AFB, Texas, Sgt. Tompkins signed out for return to Chanute AFB on June 22, 1963, at approximately 3:00 P.M. Driving his own automobile, he arrived in Topeka, Kansas, at the home of his wife at approximately 3:00 A.M. on June 23. Sgt. Tompkins remained in Topeka until that afternoon, and proceeded to Kansas City, Missouri, where he visited his mother-in-law, Mrs. Dorothy Johnson, at whose home Sgt. Tompkins arrived between 4:00 P.M. and 4:30 P.M., June 23. After leaving his mother-in-law's home, he proceeded east on U. S. Highway 40. At approximately 7:15 P.M., June 23, 1963, the automobile which Sgt. Tompkins was driving crossed the center lane of the highway, in Kansas City, Missouri, and collided head-on with an automobile driven by Eugene E. Bissell, and occupied by Maxine Gampher, Susan Gampher, Sylvia Lynn Gampher, Steven Glen Gampher and Linda Kay Bissell.

The present actions were brought for the wrongful death of Eugene E. Bissell, Maxine Gampher and Susan Gampher, and for personal injuries to Sylvia Lynn Gampher, Steven Glen Gampher, and Linda Kay Bissell, as well as for loss of services, etc.

Sgt. Tompkins was also killed as a result of injuries sustained in the accident.

Jurisdiction was conferred upon the District Court by §1346(b) of Title 18 of the United States Code, commonly known as the Federal Tort Claims Act, Act of August 2, 1946, Ch. 753, 60 Stat. 843, as amended, said statute being hereinabove set forth in full at page 3 of this Petition.

ARGUMENT

The principal question raised by this petition is the effect to be accorded the federal law respecting the employment relationship between the United States and its military personnel under the Federal Tort Claims Act. The question is severely complicated by reason of the Act's requirement be determined under the law of the particular State or Territory where the tortious act occurred. This case clearly involves the law of the State of Missouri, which is itself considerably confused.

The philosophic divergence of the various circuits with regard to this question has been noted in several cases. *U. S.* v. *Mraz,* (10th Cir., 1958) 255 F.2d 115; *Cooner* v. *U. S.,* (4th Cir., 1960) 276 F.2d 220; *Sample* v. *U. S.,* (D.C., Minn., 1959) 178 F. Supp. 259; *O'Brien* v. *U. S.,* (D.C., Maine, 1964) 236 F. Supp. 792. On the one hand, some courts have categorically refused to impose liability on the Government for torts occurring during transportation connected with permanent changes of station, e.g., *U. S.* v. *Eleazer,* (4th Cir., 1949) 177 F.2d 914, cert. denied (1950) 339 U.S. 903, 70 S. Ct. 517, 94 L. Ed. 1333; *U. S.* v. *Sharpe,* (4th Cir., 1951) 189 F.2d 239; *Chapin* v. *U. S.,* (9th Cir., 1958) 258 F.2d 465; apparently upon a theory of suspension of the employment relationship during such permanent change of station. On the other hand, other courts have found liability in such circumstances, see particularly *Cooner* v. *U. S.,* supra, which contains a full discussion of prior decisions, *U. S.* v. *Mraz,* supra; *O'Brien* v. *U. S.,* supra; and *Hinson* v. *U. S.,* (5th Cir., 1958) 257 F.2d 178. In *Sample* v. *U. S.,* supra, the serviceman was, as in the case at bar, on temporary duty orders, returning

to his parent unit. See also 29 Cincinnati Law Review 406 (1960) for detailed discussion of the cases to that time. The author there, First Lieutenant Richard L. Pemberton of the Army Judge Advocate General's department, after criticizing the *Cooner, Hinson,* and *Mraz* decisions, states:

> "The PCS [i.e. permanent change of station] situation must be distinguished from one in which a serviceman is ordered to perform short-term travel incident to the routine performance of his job. Temporary duty travel (TDY), as distinguished from PCS travel, in private automobiles generally has been considered within the scope of employment. The most recent case so holding summarized: 'A permanent transfer of great distance and time, allowing some amount of discretion to the employee, is generally the employee's personal trip, while a transfer, temporary and recurring in nature, of less distance, time and discretion . . .' [*Sample* v. *U. S.*, supra] Both the control and purpose tests are more easily satisfied in the TDY situation."
>
> —L.c., p. 458.

The question does not become one which turns simply upon whether the serviceman is traveling under PCS or TDY orders, however. In the *Cooner* and *O'Brien* cases, for example, the finding of liability was based upon a more extensive recognition of the federal statutes and the military branch's regulations and procedures under applicable state law, than, for example, in the *Eleazer* and *Chapin* cases.

In the instant case, a number of such federal factors were presented: Sgt. Tompkins was traveling from Sheppard Air Force Base, Texas, to his permanent duty station at Chanute Air Force Base, Illinois, under both temporary duty orders and separate travel orders. He had been granted delay in route time, under Air Force

Manual 35-22 B, ¶17, requiring such delay in route to provide "an adequate period for the member to perform the travel in a reasonable manner," when traveling by privately owned conveyance is authorized. He was subject not only to Air Force regulations requiring him to maintain certain standards of conduct, appearance and safety, Air Force Manual 35-22, ¶47 (after *O'Brien* v. *U. S.*, supra), but to the Uniform Code of Military Justice, Articles 111 and 112, 10 U.S.C. §§911 and 912, providing for Court-martial for operating a motor vehicle while drunk, or in a reckless or wanton manner, or for being drunk on duty. Admittedly the U.C.M.J. is to some extent a criminal code; however, the sanctions provided—loss of pay and allowances and discharge, either dishonorable or bad conduct, as well as confinement—go to the heart of the employment relationship, and are generally considered civil, rather than criminal sanctions. See Manual of Courts Martial, 1951, as set forth in part at 10 U.S.C.A. §856 at p. 244.

Furthermore, while Sgt. Tompkins was granted delay in route time, he was apparently hurrying back to his permanent duty station in order not to use up his leave time. See Defendant's Exhibits 6 and 7. At any rate, he was reimbursed for the use of his automobile. (Stipulation, R. 28).

The Court of Appeals for the Eighth Circuit, below, found that whatever right of control the Government had under the U.C.M.J. was unique, apparently because arising out of the peculiar relationship between the Government and its military employees; as such, it could not be considered as bearing upon scope of employment under state law. (App. A6). The Court also disregarded the effect of reimbursement for travel expenses, as the 5¢ per mile paid to Sgt. Tompkins was less than the 7¢ per

mile he would have been allowed had the use of his automobile been for the convenience of the Government. (App. A4-A5).

The law of the State of Missouri, which governs as the place of the tortious act, is quite confused on the doctrine of *respondeat superior*. The District Court held, in effect, that for an employee's acts to be within the scope of his employment under Missouri law, they must be such acts as the employer would have the right to control in detail, and that such right must extend to the very instant of the act causing the injury. By this the Court apparently meant that the employer must have had the right to control the actual mechanical details of operating the automobile at the time of this accident, as well as Sgt. Tompkins' route, and times of departure and arrival. In support of this proposition, the Court relied most heavily upon *Riggs* v. *Higgins,* (Mo. S. Ct. en banc, 1937) 106 S.W.2d 1, and *Reiling* v. *Missouri Insurance Co.,* (Mo. App. 1941) 153 S.W.2d 79, which seem to support the proposition. However, other cases discuss other factors to be considered and relied upon. Moreover, the Missouri Supreme Court, by Order effective January 1, 1965, adopted its Rules 70.01 and 70.02 relating to jury instructions. Rule 70.01 provides in part:

"70.01 . . .

(b) Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the Court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

(c) The giving of an instruction in violation of the provisions of this rule shall constitute error, its prejudicial effect to be judicially determined."

Instructions 13.02 and 13.05 would clearly be applicable in the instant case. These provide as follows:

> "13.02 Acts were within the 'scope and course of employment' as that term is used in this [these] instruction[s] even though not specifically authorized by (name of master) if:
>
> 1. they were done by (name of servant) to further the [business] [interests][1] of (name of master) under the general authority and direction of (name of master), and
>
> 2. they naturally arose from the performance of (employee's) work.
>
> "13.05 Acts were within the 'scope and course of employment' as that term is used in this [these] instruction[s] if:
>
> 1. they were a part of the work (name of servant) was employed to perform, and
>
> 2. they were done by (name of servant) to serve the [business] (interests][1] of (name of master)."

While, of course, no jury would be available in the instant case under 28 U.S.C. §2402, and while a Federal Court would not be bound to give these instructions, they being purely a matter of procedure and not binding on courts other than the forum, these instructions reflect what the Missouri Supreme Court clearly assumes is an accurate statement of Missouri law. They make no mention of a right of control, MAI 13.02 referring only to "*general* authority and direction" (emphasis supplied).

Notes on Use [to Original].

1. Select the more appropriate term.

[Applicable only to 13.05] This definition may be used where the master-servant relationship is admitted but master alleges that servant was not on master's business.

It was petitioner's position below that the right of control test referred solely to a determination of whether or not the general status of the tort feasor at the time of the act complained of was that of an employee or servant. Petitioners will not overburden this argument with a detailed exposition of this theory, but a single example will be instructive. In *Vert* v. *Metropolitan Life Ins. Co.*, (Mo. S. Ct., en banc, 1938) 342 Mo. 629, 117 S.W.2d 252, the employee, Crowe, was a debit collector for the defendant, and subject to many detailed rules concerning his collection duties. He also sold insurance for the defendant as a separate and subsidiary job. Having completed his collection duties, he attempted to call on a prospective customer outside his collection district, and was involved in an accident while returning.

The Supreme Court of Missouri carefully distinguished between the two jobs in the following languages:

> "When Crowe left his debit district to engage in obtaining old line life insurance business outside of it, he left his regular employment . . . in selling life insurance elsewhere, he was not running on such physical errands for his employer but became, while he was outside of his debit solely what is ordinarily known as a life insurance agent, working on his own initiative solely for the purpose of bringing about contractual relations between his company and others. *He then had an entirely different relationship with his principal than he did when performing his regular duties* in his debit which included physical errands, which required his physical services to accomplish and which we may assume the company had the right to direct. *In the former relation, his physical movements were only incidental and it made no difference to the company when or how they were made; while in the latter they were the direct method of accomplishing the result sought and the company had the right to direct them . . .*" (emphasis supplied).

In the cases of *Riggs* v. *Higgins*, supra, and *Reiling* v. *Missouri Ins. Co.*, supra, relied upon so heavily by the Courts below, the employees were debit collectors only, and subject to none of the rights of control involved in Crowe's capacity as such in the *Vert* case.

In none of these decisions is the term "independent contractor" used. Yet that is clearly the classification which must be employed with regard to the employees at the time of the accidents in the three cases discussed so briefly here. (The Court referred, in the *Vert* case, to Crowe as "an agent to bring about contractual relations only, and not a mere employee or servant." 117 S.W.2d at 257). The Missouri court is, then, discussing the right to control solely to determine the employee's status at the time of the tortious act, not whether the employer had a right to control that particular act.

Moreover, the Missouri courts look to a number of other factors to determine "right of control." These include:

(1) That the employee was obeying a direct order. *Schmitt* v. *American Press*, (Mo. App., 1931) 42 S.W.2d 969. Obviously under the stipulation (R. 28), Sgt. Tompkins was acting under explicit orders compelling him to travel from Sheppard AFB, Texas, to Chanute AFB, Illinois.

(2) That the employee was reimbursed in whole or in part for the use of his private vehicle. *Margulis* v. *Nat'l Enameling and Stamping Co.*, (Mo. S. Ct., Div. 1, 1929) 23 S.W.2d 1049; *Corder* v. *Morgan Roofing Co., et al.*, (Mo. S. Ct., Div. 1, 1942) 166 S.W.2d 455. Clearly this was the case here; the operative fact is that Sgt. Tompkins was reimbursed, not that the rate of his reimbursement was based upon the convenience or lack of convenience to

the Government, and this is clear under *Corder* v. *Morgan Roofing Co.*, supra.

(3) The trip was primarily motivated by the interests of the employer. *Steinmatz* v. *Saathoff, et al.*, (Mo., 1935) 84 S.W.2d 437; *Burgess* v. *Garvin*, (Mo. App., 1925) 272 S.W. 108. This is unquestionably the case, since the Government *ordered* Sgt. Tompkins to return to Chanute AFB.

(4) Sgt. Tompkins was authorized to operate his own vehicle with the knowledge and consent of the Government. *Margulis* v. *Nat'l Enameling and Stamping Co.*, supra, *Burgess* v. *Garvin*, supra, and *Smith* v. *Fine*, (Mo. S. Ct., Div. 2, 1943) 175 S.W.2d 761. This is also admitted by the stipulation.

(5) Sgt. Tompkins was required to accomplish the assigned task within a limited period of time. *Smith* v. *Fine*, supra; *Stokes* v. *Four-States Broadcasters*, (Mo., Div. 1, 1957) 300 S.W.2d 426.

(6) Sgt. Tompkins was on active duty. See Report of Casualty, Plaintiff's Exhibit 4. Under 10 U.S.C. §101 (22) this means "full-time duty in the active military service of the United States."

(7) Sgt. Tompkins was using his vehicle in furtherance of his master's interest rather than his own. *Schmitt* v. *American Press*, supra; *Corder* v. *Morgan Roofing Co.*, supra. This is unquestionable here, as Sgt. Tompkins had no apparent business east of Kansas City except that of the Government.

The decision of the District Court turned apparently upon Sgt. Tompkins' freedom to select any method of transportation he chose, and the lack of specific instructions to him as to how he was to drive or what route he

was to take. (R. 32, 33). The Court of Appeals noted that Sgt. Tompkins received a mileage allowance for the use of his automobile at the rate of five cents per mile, whereas had this been for the convenience of the Government he would have been allowed seven cents per mile. "There is nothing in the record to indicate that any benefit accrued to the Government by Sgt. Tompkins' use of his own car . . . or that the Government in any way attempted to exercise or reserve any control over Sgt. Tompkins' use of his automobile in event he elected to use the automobile for his trip. . . ." (App. A5).

Petitioners submit that there is error for the reason that the requisite right of control was present, even if the District Court's determination that such right must exist at the very time of and with respect to the very act or omission complained of.

The record reveals that Sgt. Tompkins was on active duty with the United States Air Force at the time of the accident in question. See Report of Casualty, plaintiff's Exhibit 4. The Air Force could have withheld authorization for him to use his private vehicle to return to his permanent duty station, and could have stipulated that he would use another method of transportation; it could have amended, revoked or rescinded his travel orders, subject only to its ability to communicate such fact to him (Air Force Manual 10-3D, §17); Sgt. Tompkins was required to conform at all times to "standards of conduct, appearance, and safety expected of members of the Air Force (Air Force Manual 35-22, dated 1 September 1949, para. 47, after *O'Brien* v. *U. S., supra;* he would have been liable to court-martial, and upon conviction, to discharge if he had survived, under Article 111 of the Uniform Code of Military Justice, 10 U.S.C. §911, Act of Aug. 10, 1956, Ch. 1041, 70A Stat. 72, for operating his vehicle while drunk, or in a reck-

less or wanton manner; he was also liable to court-martial; and upon conviction, discharge, for being drunk on duty under Article 112 of the Uniform Code of Military Justice.

When the pertinent factors arising from federal law and Air Force regulations are considered, it will be seen that the United States had such a relationship to Sgt. Tompkins at the time of the accident as to render it liable for the deaths and injuries which occurred.

As was pointed out in *U. S.* v. *Muniz*, (1963) 374 U.S. 150, 83 S. Ct. 1850, 10 L. Ed. 2d 805, the Federal Tort Claims Act extends to new and unprecedented forms of liability. In that case, this Court upheld the right of federal prisoners to sue the United States for the negligence of government employees during their confinement. In so doing, the Court disregarded state rules of immunity from suits for tortious acts by prison employees and officials. "[T]he duty of care owed by the Bureau of Prisons is fixed by 18 U.S.C. §4042 independent of an inconsistent state rule." 374 U.S. at 164-165. In other words, the federal standard of care was preferred to the exclusion of a state standard.

The situation is not materially different here. The Air Force regulations and the U.C.M.J. impose standards of care upon Air Force personnel; they also provide for a measure of control, with sanctions quite unlike those of state statutes prohibiting similar activity. These sanctions, as noted above, go to the heart of the employment relationship; they are separate and distinct, and may be imposed in addition to, such state laws. See *Thompson* v. *Willingham*, (D.C., Pa., 1962) 217 F. Supp. 901, aff'd 318 F.2d 657. The clear purpose of these regulations and the U.C.M.J. is to permit the United States to retain a measure of control over military personnel at all times while they are on active duty.

Hence, because of other factors which properly point toward liability under the doctrine of *respondeat superior*, these statutes and regulations may provide the missing link of right to control without regard to the fact that this right would extend equally to personnel in leave or retired status. In other words, such other factors as those set forth above would protect the United States from suits clearly beyond the scope of liability envisioned by the Federal Tort Claims Act, such as a serviceman returning for a visit to his home on leave.

The doctrine of *respondeat superior* is at best unavoidably arbitrary, and its application in suits against the United States is further complicated by both the many interpretations placed upon it by the States, and the absence of State decisions relating to the incidents of federal sovereignty. Missouri, if the District Court's statement of the rule is accepted as correct, stands at the conservative extreme, making it virtually impossible for the innocent victims of the wrongful or negligent act of a serviceman, committed in that State, to recover against the United States. Unless resort may be had to the Uniform Code of Military Justice and general regulations of the military branch to determine right of control, such victims are faced with the impossible burden of discovering and proving orders or regulations imposing the Government's right to control in detail particular acts, and further ascertaining whether or not that right existed with respect to a particular act at a particular time. Common sense, the rationale of the Missouri cases herein cited, and the underlying purpose of the Federal Tort Claims Act clearly require that no such burden be imposed.

Moreover, by permitting the use of such general statutes and regulations, the Court will settle the inconsistent

attitudes and approaches of the various circuits once and for all. There is no danger of such a ruling opening the door to tenuous or clearly non-existent claims, as, for example, the usual requirements of serving the employer's purposes, being engaged in his or its business, etc., must still be met, and can be appropriately applied by the courts.

Petitioners do not desire this Court to change or liberalize the law of Missouri. That law, perhaps, requires careful consideration and explication, but its basic tenets are clear. Petitioners only request that this Court recognize the implications of the employment relationship between the United States and its military personnel in full, and to apply these implications to the law of Missouri.

CONCLUSION

Unless this petition is granted, and the judgment below is reversed, petitioners will be without any suitable remedy for the loss of three lives, and for severe and permanent injuries to the three survivors. Sgt. Tompkins left no estate worthy of note, and, during the pendency of the appeal to the Eighth Circuit, his insurance carrier became insolvent and engaged in bankruptcy proceedings. Petitioners' only alternative would be to apply for an appropriation from Congress by a private bill.

In the broader sense, however, the inconsistent and contradictory attitudes of the various Courts of Appeal with regard to the applicability of the federal law governing the serviceman's relationship to the United States to the State laws of *respondeat superior*, will necessitate this Court's granting certiorari, either now or later. The question is of substantial and growing importance, and must be finally settled.

For the above and foregoing reasons petitioners pray the Court to grant this writ of certiorari.

Respectfully submitted,

REESE, CONSTANCE & SLAYTON

ALAN B. SLAYTON
501 W. Lexington
Independence, Missouri
KRETSINGER & KRETSINGER

TOM B. KRETSINGER
450 Professional Building
Kansas City, Missouri
Attorneys for Petitioners